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No. 89-1857 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DUANE GALLOWAY, ON BEHALF OF SEAN and KELLY GALLOWAY, MINORS,
Petitioner,

v.

LORIMAR MOTION PICTURE MANAGEMENT, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a state court in which a complaint alleging violations of the Securities Act of 1933 has been filed may dismiss that complaint if it fails to state a claim upon which relief may be granted, fails to comply with state rules regarding the form of pleading, and is not supported by facts sufficient to withstand a motion for summary judgment, and the court determines that it would not be appropriate to exercise its jurisdiction under the doctrine of *forum non conveniens*.

RULE 29.1 STATEMENT

Respondent Lorimar Motion Picture Management, Inc. is a wholly-owned subsidiary of respondent Lorimar Telepictures Corporation. Respondent Prudential-Bache Properties, Inc. is a subsidiary of Bache Group, Inc. Respondent Prudential-Bache Securities, Inc. is an affiliate of Respondent Prudential-Bache Properties, Inc.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The opinions below and statutes involved are set forth as Appendices A-D to Petitioner's opening brief. While Petitioner claims that jurisdiction lies under 28 U.S.C. § 1257, Respondents question that claim for the reasons set forth herein.

STATEMENT OF THE CASE

Both legally and factually, this case differs substantially from the one depicted by petitioner Duane L. Galloway ("Petitioner"). Properly viewed, it fails to estab-

lish the deprivation of any right under any federal statute or to provide the "special and important reasons" necessary for issuance of a writ of certiorari.

The Parties

Petitioner, who resides in Sandusky, Ohio, purchased four units in a limited partnership named Lorimar Film Partners, L.P. (the "Limited Partnership") for $4,000. (App. 6, ¶ 26.)[1] Petitioner purports to represent a plaintiff class consisting of 7,180 investors owning 33,854 units of the Limited Partnership. (App. 6, ¶¶ 82 and 84; App. 9, ¶ 4.) Only 467 members of the purported class reside in Ohio; on the other hand, 6,713 reside in other states, including 843 investors (or 11.7% of the class) who reside in California. (App. 9, ¶ 4.)

Respondent Lorimar Motion Picture Management, Inc. ("LMPM") is a California corporation with its principal place of business in Culver City, California. (App. 6, ¶ 3.) LMPM is a wholly-owned subsidiary of Respondent Lorimar Telepictures Corporation ("Lorimar"), a Delaware corporation with its principal place of business in California. (App. 6, ¶ 4; App. 11, ¶ 3.)

Respondent Prudential-Bache Securities, Inc. ("Pru-Bache Securities") is a Delaware corporation with its principal place of business in New York. (App. 6, ¶ 14.) Respondent Prudential-Bache Properties, Inc. ("Pru-Bache Properties") also is a Delaware corporation with its principal place of business in New York. (App. 6. ¶ 7.)[2]

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[1] Citations to "App. ——" are to the index number and, where appropriate, page and paragraph number of documents in the three volumes of Appendices filed in connection with Petitioner's appeal to the Ohio Supreme Court. Citations to "Pet. ——" are to the text and/or Appendices to the Petition.

[2] At the time of the events described in the Complaint, the individual defendants were residents of New York, New Jersey, Connecticut and California. (App. 11, ¶ 5; App. 13; App. 14; and App. 15.)

The Public Offering Of Limited Partnership Units

On October 1, 1985, LMPM and Pru-Bache Properties formed the Limited Partnership, which has its principal place of business in Los Angeles, California. (App. 6, ¶ 2; App. 11, ¶ 4.) LMPM is the Managing General Partner of the Limited Partnership and Pru-Bache Properties is its Co-General Partner. (App. 6, ¶¶ 7-10.) Limited Partnership Units were sold to the public in a registered public offering during 1985 and 1986, and the material facts pertaining to the Units were disclosed in a Prospectus.[3]

The Prospectus fully disclosed that the Limited Partnership's film-making activities would be "subject to all the risks associated with the motion picture industry generally." (App. 7, p. 14.) Thus, the Prospectus warned potential investors that, among other things, investment would be "highly speculative" and would involve "a high degree of risk," and that there "[could] be no assurance that the Partnership's investment in the production and distribution of its films will ever be returned." (App. 7, pp. 13-14.)

The Prospectus also disclosed three principal mechanisms to protect the purchasers of Limited Partnership Units from potential management and self-dealing problems. First, it described and attached fundamental agreements spelling out various rights, duties and limitations regarding relations between the Limited Partnership and

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[3] The Prospectus fully disclosed that, at the commencement of the public offering in December 1985, LMPM already had selected, and the General Partners already had approved, three films (and their budgets) that the Limited Partnership would finance. (App. 7, pp. 7, 35.) On February 12, 1986, the Limited Partnership issued a Supplement to the Prospectus which disclosed, among other things, that "The Morning After" had "been approved as the next Partnership Film . . . in accordance with the Partnership Agreement," and that the estimated budget for the film was $15,500,000. (App. 8.) No other films were produced.

the Managing General Partner and related entities. Second, it described and attached fundamental agreements spelling out rights and duties of the Co-General Partner related to the protection of the economic interests of itself and the holders of the Limited Partnership Units. Third, it described and attached fundamental agreements spelling out the duties and limitations of an Advisory Committee which consisted of three representatives each of the Managing General Partner and the Co-General Partner. The Prospectus disclosed that the Co-General Partner (*i.e.*, Pru-Bache Properties) could approve, on its own, without resort to the Advisory Committee, transactions between the Lorimar affiliates and the Limited Partnership. (App. 7, p. 24; *see also id.* at pp. 13, 16, 46, 79.) Indeed, as the Prospectus disclosed, the Co-General Partner had approved three of the four films financed by the Limited Partnership in this very fashion. (App. 7, pp. 7, 13, 32-33.) Further, the Co-General Partner was required to approve all budgets on films. (App. 7, pp. 8, 35, A-29.)

The Prospectus also disclosed that the General Partners had the power—at any time—to "expand or contract" the Advisory Committee's functions and that the Committee could be dissolved. (*Id.*, pp. 46, A-26.) Of course, even if that were to occur, the investors would still be protected because the consent of the non-interested Co-General Partner would be required in conflict situations (*id.*) and because the Managing General Partner was required to act in the best interest of the Limited Partnership and subject to the terms and conditions of the various disclosure agreements. (*Id.*, p. 85.)

Petitioner's Claims

Disappointed with the economic performance of the Limited Partnership, on or about April 27, 1988, Petitioner commenced this nationwide class action. He filed a four count complaint (App. 6) in the Court of Common Pleas for Richland County, Ohio which challenged op-

erational transactions in California by some of the defendants. The heart of Petitioner's complaint was his allegation that the Limited Partnership was mismanaged, and partnership assets wasted, in breach of the General Partners' fiduciary duties. (Fourth Cause of Action.) From this cornerstone allegation, Petitioner also attempted to plead violations of the Securities Act of 1933 (the "1933 Act") (First and Second Causes of Action) on the theory that Respondents purportedly failed to disclose that they "intended to" breach their fiduciary duties after the offering of Units in the Limited Partnership.[4]

Disposition In The Ohio Courts

The trial court dismissed all of Petitioner's claims on several alternative grounds. It dismissed Petitioner's First and Second Causes of Action (based on the 1933 Act) for failure to state a claim upon which relief could be granted under Ohio Rule of Civil Procedure 12(B)(6) and failure to plead fraud with particularity under Ohio Rule of Civil Procedure 9(B). The trial court also granted summary judgment on the First and Second Causes of Action, finding that the Prospectus disclosed all material facts pertaining to the transactions about which Petitioner complains. The trial court dismissed the Fourth Cause of Action under Delaware law, holding that it could only be brought derivatively, and not directly as a class action. Finally, the trial court dismissed the entire Complaint under the Ohio state law doctrine of *forum non conveniens* and dismissed the Complaint as to the individual defendants for lack of personal jurisdiction.

On appeal to the Ohio Court of Appeals for the Fifth District, Petitioner contested some, but not all, of the

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[4] A third cause of action for negligent misrepresentation also was asserted and dismissed, but no challenge on appeal was taken from that determination.

trial court's actions.[5] The Court of Appeals unanimously affirmed in all respects, except for the trial court's dismissal of the Fourth Cause of Action on the grounds that it was improperly filed as a direct action rather than as a derivative action.

On March 21, 1990, the Ohio Supreme Court dismissed Petitioner's appeal *sua sponte* on the ground that no substantial constitutional question existed under Ohio law.

ARGUMENT

I. PETITIONER HAS FAILED TO MEET THE THRESHOLD REQUIREMENTS FOR A GRANT OF CERTIORARI.

The standards for grant of a writ of certiorari are stringent. To support jurisdiction, Petitioner must demonstrate that he has been deprived of a right accorded by federal statute. *See* 28 U.S.C. § 1257. Even then, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor." R. 10(1), Supreme Court Rules.[6]

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[5] Petitioner did not appeal the dismissal of his Third Cause of Action, a claim of negligent misrepresentation. He appealed the dismissal of the Second and Fourth Causes of Action as to all defendants. He appealed the dismissal of the First Cause of Action as to defendant Pru-Bache Securities only.

[6] Rule 10(1) suggests two "special and important" circumstances in which this Court would review a state court judgment:

> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals[, and]
>
> (c) When a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

When viewed in light of the record and controlling authorities, the instant Petition wholly fails to meet these standards.

Petitioner states the question presented in such a way that, if it were adopted by this Court, no claim filed in state court under the concurrent jurisdiction grant of the 1933 Act could ever be dismissed before trial, regardless of whether or not the complaint filed in state court was sufficient to state a claim, complied with state procedures, was supported by evidence sufficient to avoid summary judgment, or was filed in a permissible but inconvenient forum. Adoption of such a rule would guarantee a trial to a person filing a 1933 Act complaint in state court, even though the same complaint filed in a federal district court would only be tried if it complied with the substantive and procedural requirements of the Federal Rules of Civil Procedure and was the most convenient forum.

Not surprisingly, none of the authorities cited by Petitioner supports such a concept of disparate treatment depending on whether state or federal court is chosen and, despite Petitioner's contention to the contrary, state courts remain free to test 1933 Act complaints under their own rules of pleading, to dismiss claims which are not supported by the evidence and to dismiss cases where the forum is inconvenient or personal jurisdiction is lacking. Accordingly, the Petition fails to raise a serious issue which justifies review by this Court.

Moreover, although Petitioner has attempted to articulate the question presented in a manner to suggest that there are no state law grounds for affirming the judgment of three levels of Ohio courts, one need only look at the Petition to confirm that state law grounds are at the root of the judgment. It is well-settled that this Court lacks jurisdiction to review a state court judgment that rests upon an "independent and adequate" state law

ground. The "independent and adequate state law" rule is a corollary to the "fundamental principle that the Court lacks jurisdiction to review matters of state law." *See* R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* § 3.25 at 169 (6th ed. 1986). As this Court explained in *Herb v. Pitcairn*, 324 U.S. 117 (1945):

> [The Court's inability to review state court judgments based upon independent and adequate state law grounds] is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.*

324 U.S. at 125-26 (emphasis added).

Here, as set forth more fully below, the Ohio state courts properly dismissed Petitioner's entire complaint under the Ohio doctrine of *forum non conveniens*. Accordingly, the judgment below rests upon an "independent and adequate" state law ground. In any event, as in *Herb v. Pitcairn*, even assuming *arguendo* that the Ohio courts misapplied federal law, "the same judgment would be rendered by the state court after [the Supreme Court] corrected its view of federal laws." As a result, this Court's review of the judgment below would "amount to nothing more than an advisory opinion." 324 U.S. at 125-26; R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* § 3.25 at 168-70 (6th ed. 1986).

II. PETITIONER'S COMPLAINT PROPERLY WAS DISMISSED PURSUANT TO THE OHIO STATE LAW DOCTRINE OF *FORUM NON CONVENIENS*.

In all events, the Ohio courts properly applied the doctrine of *forum non conveniens* and other legal principles in dismissing Petitioner's complaint. Under the Ohio common law doctrine of *forum non conveniens*, a court may dismiss an action over which it has jurisdiction when, considering a series of private and public interest factors, it is more appropriate to resolve the dispute in another forum. *Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 35 Ohio St. 3d 123, 125-27, 519 N.E.2d 370, 372-74 (1988) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947)).[7] Further, an appellate court may overturn a trial court's dismissal on the ground of *forum non conveniens* only if the trial court committed "a clear abuse of discretion." *Chambers*, 35 Ohio St. 3d at 127, 519 N.E.2d at 374.

Petitioner does not even attempt to argue that the trial court improperly analyzed the public and private interest factors enunciated in *Chambers* or that, if the doctrine is in fact applicable, the trial court abused its discretion. (*See* Pet. at 34, n. 15.) Instead, in a trans-

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[7] Private interest factors include:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Chambers, 35 Ohio St. 3d at 126-27, 519 N.E.2d at 373 (quoting *Gilbert*, 330 U.S. at 508). Public interest factors include:

> [T]he administrative difficulties and delay to other litigants caused by congested court calendars, the imposition of jury duty upon the citizens of a community which has very little relation to the litigation, a local interest in having localized controversies decided at home, and the appropriateness of litigating a case in a forum familiar with the applicable law.

Id. at 127, 519 N.E.2d at 373-74.

parent attempt to circumvent the strict abuse of discretion standard and simultaneously to manufacture a federal question, Petitioner argues that the doctrine of *forum non conveniens* may never be applied by a state court in a case under the 1933 Act where a plaintiff is a resident of the forum state. According to Petitioner, the concurrent jurisdiction provision of the 1933 Act mandates that the state court in which the case is filed is obligated to exercise that jurisdiction. (Pet. at pp. 33-44.) Petitioner cites no authority for his position. Moreover, Petitioner misses two critical points: (1) all states are equally conferred with subject matter jurisdiction; thus, there is no need for any special rule for cases under the 1933 Act with regard to the distribution of cases among the various states, and (2) if the action were filed in federal court, the case could be transferred to a more convenient forum under 28 U.S.C. § 1404(a).

Under well-settled principles of law, although the doctrine of *forum non conveniens*, as articulated in *Chambers*, makes a plaintiff's choice of forum only one of several private and public interest factors to be balanced, that factor alone is never controlling. Indeed, as this Court has recognized, where, as here, a plaintiff deliberately chooses to represent thousands of class members scattered across the United States, a named plaintiff's claim *"that a forum is appropriate merely because it is his home forum is considerably weakened."* *Koster v. American Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 524 (1947) (cited with approval in *Chambers*) (emphasis added) (footnote omitted).

The cases cited by petitioner do not detract from this conclusion. Indeed, they only reinforce it. For example, in *Beres v. Thomson McKinnon Securities, Inc.*, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,395 (S.D.N.Y. Sept. 10, 1987), although the district court denied a motion to transfer a class action brought by a resident plaintiff where the balance was tipped at least

slightly in favor of retention, it did so only after performing a traditional *forum non conveniens* analysis of all appropriate public and private factors, including: "(1) the convenience to the parties; (2) the convenience of witnesses; (3) the relative ease of access to sources of proof; (4) the availability of process to compel attendance of unwilling witnesses; (5) the cost of obtaining willing witnesses; (6) the practical problems in dictating where the case can be tried more expeditiously and inexpensively; and (7) the interests of justice." *Id.* at 97,063. Further, at least impliedly, the *Beres* court made clear that the plaintiff's choice of forum alone was not enough to defeat a motion to transfer, emphasizing that "nor . . . do plaintiffs claim that the *sole* reason transfer should not be granted is that New York is their home forum." *Id.* at 97,064 (emphasis in original).

Similarly, in *Abeloff v. Barth*, 119 F.R.D. 315 (D. Mass. 1988), the district court did not, as Petitioner suggests, reject a motion to transfer out of hand because the action was brought by a resident plaintiff. Instead, like the *Beres* court and the Ohio courts here, it analyzed *all* applicable public and private interest factors in reaching its conclusion.[8]

Petitioner's further argument that a trial court may dismiss an action under *forum non conveniens* only after it makes a "finding that an alternate forum existed or that plaintiff would be able to maintain suit in that forum" (Pet. at p. 37) not only raises an issue purely of state law, it is also unavailing. To begin with, *Chambers* states nothing more than that the doctrine of *forum*

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[8] Similarly, although *McDonnell-Douglas Corp. v. Lohn*, 192 Colo. 200, 557 P.2d 373, 374 n.1 (1976), *Kelce v. Touche Ross & Co.*, 192 Colo. 202, 557 P.2d 374, 375 (1976), *Casey v. Truss*, 720 P.2d 985, 986 (Colo. App. 1986) and *Archibald v. Cinerama Hotels*, 15 Cal. 3d 853, 860 n.8, 544 P.2d 947, 952 n.8, 126 Cal. Rptr. 811, 816 n.8 (1976) all accord some deference to a resident plaintiff's choice of forum, all recognize that the choice of forum may be disregarded where the resident plaintiff is only a nominal party.

non conveniens typically "presupposes the availability of another forum in which the defendant may be sued." 35 Ohio St. 3d at 126, 519 N.E.2d at 373. *Chambers* does *not* state that dismissal *must* be conditioned upon refiling in the alternative forum. Further, there plainly are alternate forums—for example, a state or federal court in California—where all corporate defendants can be sued. And notably, although he carefully implies that dismissal on *forum non conveniens* grounds *may* affect the viability of his claims, Petitioner has not even had the temerity to claim that other forums were in fact closed to him.[9]

In sum, the trial court meticulously undertook an analysis of all relevant factors—an analysis which Petitioner does not challenge—and concluded that *forum non conveniens* dismissal was appropriate.[10] There is thus

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[9] Finally, although Respondents, in their motion to dismiss, asked the trial court to dismiss "upon such conditions for re-filing in California as the court in its sound discretion deems just and appropriate" (App. 17), Petitioner failed even to pursue the point with the trial court. (App. 21.) Accordingly, Petitioner has waived the argument. *See, e.g., State v. Glaros*, 170 Ohio St. 471, 166 N.E.2d 379, 380 (1960) ("It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.") (Syllabus 1); *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 436 N.E.2d 1001 (1982).

[10] Petitioner's studious avoidance of the Ohio courts' analysis of the applicable public and private interest factors was no accident: it is difficult, if not impossible, to imagine a case where the forum selected would be more inconvenient. As the trial court found, the transactions complained of were primarily centered in California, as was the bulk of relevant witnesses and documents. In contrast, as the court also found, Ohio had extremely tenuous links with the underlying facts and circumstances of this action, the only real link being that a Sandusky plaintiff chose Mansfield, Ohio as his forum. Considering the further practical burdens on the parties and witnesses which would surround a trial over California transactions in such a distant forum, there simply can be no dispute that the trial court's ruling was well within its discretion.

no federal question, no basis to conclude that the trial court abused its discretion and no reason for a writ of certiorari to issue here.

III. THE OHIO COURTS PROPERLY CONSIDERED AND DISMISSED PETITIONER'S SECURITIES ACT CLAIMS ON THE MERITS.

The Ohio courts did not, as Petitioner curiously suggests by his wording of the question presented, refuse to address the merits of his securities law claims. To the contrary, Petitioner's claims were evaluated on their merits and found wanting. In particular, the trial court dismissed the 1933 Act claims (*i.e.*, the first two Causes of Action) because they represented an improper attempt to convert (or "bootstrap") a breach of fiduciary duty claim into federal securities law causes of action.[11] Although Petitioner strenuously argues that the Ohio courts have misconstrued "this important federal securities law principle" (Pet. at 20, n.10), the Ohio courts' application of the principle was neither novel nor incorrect.

In *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977), this Court held that the federal securities laws do not apply to "instances of corporate mismanagement . . . in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary."[12] Many cases following *Santa Fe* hold that "a plaintiff may not 'bootstrap' a claim of breach of fiduciary duty

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[11] The trial court also granted summary judgment on the *merits* of those claims. (*See* discussion at pp. 15-16, *infra*.) Thus, contrary to Petitioner's argument, he has had his day in court on his federal claims.

[12] As the court stated, " 'Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.' " 430 U.S. at 479 (quoting *Court v. Ash*, 422 U.S. 66, 84 (1975) (emphasis in original)).

into a federal securities claim by alleging that directors failed to disclose [a] breach of fiduciary duty." [13] In this case, the Ohio courts properly found the reasoning of *Santa Fe* to be controlling.

Although it does not specifically use the word "mismanagement," the essence of the Complaint is that defendants allegedly "mismanaged" the Limited Partnership and "wasted" its assets, thus breaching their fiduciary duty. For example, Petitioner alleges that defendants overpaid for goods and services, paid to themselves "virtually the entire proceeds of the offering," and disregarded certain "conflict of interest" procedures. (*See* App. 6, ¶¶ 74-76.) Although Petitioner has attempted to convert his allegations into a purported material omission from the Prospectus—*i.e.* that the General Partners never intended to follow the conflict of interest procedures set forth therein—that argument was considered by the Ohio courts and rejected legally and factually. The Ohio courts properly found that all necessary disclosures were made. (Pet. at pp. B72-73; C87, 93-95.) Moreover, they determined that Petitioner did nothing more than attempt to give his "mismanagement" and "waste" claims retroactive effect by clever pleading.[14] Such plead-

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[13] *Kas v. Financial Gen. Bankshares, Inc.*, 796 F.2d 508, 513 (D.C. Cir. 1986); *see also Panter v. Marshall Field & Co.*, 646 F.2d 271, 288-89(7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Maldonado v. Flynn*, 597 F.2d 789, 796 (2d Cir. 1979); *Lester v. Preco Indus., Inc.*, 282 F. Supp. 459, 462-63 (S.D.N.Y. 1965).

[14] One need only compare Petitioner's specific "omission" allegations with his specific allegations of "mismanagement' 'and "waste" to confirm that Petitioner has engaged in classic bootstrapping. Thus:

> (1) Petitioner alleged that Respondents breached their fiduciary duty by causing the Partnership to pay "unreasonably high" amounts to Lorimar for goods and services (App. 6, ¶ 74), and that Respondents failed to disclose in the Prospec-

ing does not give rise to a federal securities claim and dismissal was thus appropriate.[15]

IV. THE TRIAL COURT'S FACTUAL DETERMINATIONS SUPPORTING SUMMARY JUDGMENT ON PETITIONER'S SECURITIES ACT CLAIMS ARE NOT APPROPRIATE FOR CERTIORARI.

Petitioner's attack on the grant of summary judgment on the First and Second Causes of Action also fails to provide a basis for review by this Court. In essence, Petitioner asserts that the Ohio courts improperly granted summary judgment because they resolved disputed issues of material fact to conclude that all necessary disclosures were made.

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tus that they "intended to make payments . . . which were unreasonably high" (App. 6, ¶ 29);

(2) Petitioner alleged that Respondents breached their fiduciary duty by paying "to themselves . . . virtually the entire proceeds of the offering" (App. 6, ¶ 75), and that Respondents failed to disclose that they "intended to pay themselves . . . virtually the entire proceeds of the offering" (App. 6, ¶ 30); and

(3) Petitioner alleged that Respondents breached their fiduciary duty by disregarding certain procedures involving the Advisory Committee (App. 6, ¶ 76), and that Respondents failed to disclose that they "did not intend to adhere to these procedures" (App. 6, ¶ 34).

[15] In a last ditch attempt to resurrect his claims, Petitioner also argues that *Santa Fe* and its progeny apply only to Section 10(b) of the Securities Exchange Act of 1934, and not to claims under Sections 11 and 12(2) of the 1933 Act (15 U.S.C. § 77k(a) and 15 U.S.C. § 77l(2)) because, the latter statute purportedly addresses only misstatements and omissions, not deceptive conduct. The supposed "distinction" that Petitioner attempts to articulate is irrelevant. Nothing in the broad language of *Santa Fe* so limits the case—and there is no reason for this Court to engraft such a limitation in an area of federal securities law that has been amply litigated in federal courts.

In addition to failing to provide any basis for asking this Court to review the Ohio courts' factual determination under principles of Ohio law, Petitioner's analysis—focusing on disclosures regarding the Advisory Committee—is wrong. There is no dispute that the Prospectus disclosed that the Advisory Committee could be dissolved. (Pet. at 27; App. 7, pp. 16, 46, and A-26.) The Prospectus also explicitly stated that the General Partner possessed unrestricted power "to expand *or contract*" any of the powers granted to the Advisory Committee. (App. 7, pp. 46, A-26) (emphasis added.) More importantly, the Prospectus permitted the non-interested General Partner (*i.e.*, Pru-Bache Properties) to approve transactions between the Lorimar affiliates and the Limited Partnership on its own, thus providing additional protection to the investors. (App. 7, p. 24.) This language, along with the other disclosures summarized above (*see* pp. 3-4), plainly supports the Ohio courts' conclusion. The "hard facts" of the Prospectus fully disclosed the procedures involving the Advisory Committee. Summary judgment was thus properly entered.[16]

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[16] Petitioner also contends that the Court of Appeals neglected to consider whether defendants' disclosures were sufficiently prominent under the so-called doctrine of "buried facts." (Pet. at p. 28.) Petitioner never raised this theory before either the trial court or the Court of Appeals and has therefore waived it. *Hamlin v. McAlpin Co.*, 175 Ohio St. 517, 196 N.E.2d 781 (1964). Moreover, the argument is frivolous. Both the potential for dissolution and the unlimited right to alter the Committee's responsibilities were prominently discussed in the Prospectus and the attached Limited Partnership Agreement—under headings titled "Advisory Committee." (Prosp. at 46; A-26.) It is impossible to imagine a more prominent or obvious place to display this information—an opinion obviously shared by the Court of Appeals, which held that reasonable investors who read the Prospectus would learn of the limits placed on the Advisory Committee.

V. THE OHIO COURTS ALSO PROPERLY CONCLUDED THAT PETITIONER FAILED TO PLEAD HIS SECURITIES CLAIMS WITH SUFFICIENT PARTICULARITY.

Petitioner's First and Second Causes of Action also were based entirely upon conclusory allegations which failed to satisfy the particularity requirements of Rule 9(B) of the Ohio Rules of Civil Procedure.[17] For that additional reason, both the trial court and the Fifth District Court of Appeals dismissed those causes of action. (Pet. at pp. B 73-75, C 95.)

Petitioner has not attempted to upset this ruling by arguing that his fraud claims were in fact pled with particularity. Instead, Petitioner, through selective citation to authority construing *Federal* Rule 9(b)'s applicability to Section 11 and 12(2) claims not involving scienter, argues that his claims are exempt from the requirements of *Ohio* Rule 9(B). On numerous levels, Petitioner's claim is without merit. To begin with, the Ohio court's determination as to the sufficiency of Petitioner's complaint was based on a state, not a federal, procedural rule. As such, Petitioner's challenge to that determination wholly fails to raise an important federal question sufficient to justify review by this Court. Further, to the extent cases construing Federal Rule 9(b) have relevance here, the better view is that claims under Sections 11 and 12(2) of the Securities Act of 1933 are claims of "fraud" within the meaning of Federal Rule 9(b) which must be "stated with particularity."[18] Finally, Petitioner himself has described *this case* as involving claims of fraud. (*E.g.*, Pet. at pp. 12, 21-23,

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[17] Ohio Rule 9(B), like Rule 9(b) of the Federal Rules of Civil Procedure, provides that any averment of fraud must be "stated with particularity."

[18] *See Center Sav. & Loan Ass'n v. Prudential-Bache Sec., Inc.*, 679 F. Supp. 274, 278 (S.D.N.Y. 1987); *In re Elscint, Ltd. Sec. Litig.*, 674 F. Supp. 374, 384 (D. Mass. 1987).

25-26.)[19] As a result, whatever the rule may be with respect to Section 11 and 12 claims not predicated on fraudulent intent, this case does involve allegations of fraudulent intent and Rule 9(B) is thus applicable. Accordingly, since the complaint made bald, conclusory allegations about fraudulent intent, without stating any supporting facts, it failed to meet the requirements of the Rule. *Stern v. Leucadia National Corp.*, 844 F.2d 997 (2d Cir.), *cert. denied*, 109 S. Ct. 137 (1988). Dismissal of the First and Second Causes of Action under Rule 9 (B) was thus proper.[20]

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[19] Thus, Petitioner's reliance upon the cases in his Memorandum is misplaced. For example, in *Schoenfeld v. Giant Stores Corp.*, 62 F.R.D. 348 (S.D.N.Y. 1974), the court specifically held that, where a complaint alleged claims under Sections 11 and 12(2) sounding in fraud, "it is clear that the . . . allegations . . . were subject to Rule 9(B)." 62 F.R.D. at 351. *See also Gould v. Marlon*, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,408 at 97,129 (D. Nev. 1987) (suggesting in *dictum* that complaint sounding in fraud is subject to Rule 9(b)); *Loan v. FDIC*, 717 F. Supp. 964, 968 n. 9 (D. Mass. 1989) (holding that Rule 9(b) not applicable to § 12(2) claim predicated upon conclusion that claim did not involve proof of fraud); *Ross v. Warner*, 480 F. Supp. 268, 273 (S.D.N.Y. 1979) (holding that Rule 9(b) not applicable to § 11 claim predicated upon conclusion that claim did not require proof of scienter); *Glaser v. Norris*, No. 9538 (Del. Ch. May 1, 1989) (same). In *Erikson v. Kiddie*, [1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,889 at 94,307 (N.D. Cal. 1986). And in *In re Lilco Sec. Litig.*, 625 F. Supp. 1500 (E.D.N.Y. 1986), the courts did *not* determine that the §§ 11 and 12 claims sounded in fraud.

[20] In his Memorandum, Petitioner also appears to argue that, even if Sections 11 and 12(2) do require compliance with Rule 9(B), he met the requirement because he allegedly has complied with Rule 8 of the Ohio Rules of Civil Procedure (which generally requires that pleadings be plain and concise). (P. Mem. at 32-33.) Such an argument, of course, would void the more stringent standards of Rule 9(B).

VI. PETITIONER ALSO DID NOT ESTABLISH THAT THE OHIO COURTS HAD PERSONAL JURISDICTION OVER THE INDIVIDUAL DEFENDANTS.

The Ohio courts' conclusion that Petitioner did not satisfy his burden of making a prima facie showing of personal jurisdiction over the individual defendants also was in accord with well-settled principles of law.[21] The Ohio long-arm statute and the due process clause of the United States Constitution authorize the exercise of personal jurisdiction over nonresident officers or directors of a corporation or partnership only if they have personal contacts with Ohio concerning the transaction at issue. *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 929-31 (6th Cir. 1974); *see also Stewart Coach Industries, Inc. v. Moore*, 512 F. Supp. 879, 883 (S.D. Ohio 1981).[22] Nonresident officers and directors are not subject to personal jurisdiction in Ohio for actions committed in their official capacities. *Weller*, 504 F.2d at 929-31. Here, Petitioner did not allege that the individual defendants had any personal contacts with Ohio concerning the Limited Partnership, or that they performed or failed to perform any act in Ohio regarding the Limited Partnership. Nor did Petitioner dispute, by facts, the defendants' affidavits to the contrary.

Petitioner's reliance upon such cases as *Anilas, Inc. v. Kern*, 31 Ohio St. 3d 163, 509 N.E.2d 1267 (1987), and *Burger King v. Rudzewicz*, 471 U.S. 462 (1985), is mis-

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[21] *See Drake v. Classic Wheels*, No. 50640, slip op. (Ohio App. May 15, 1986) (a plaintiff must plead and prove the existence of personal jurisdiction over each defendant). (App. 30.)

[22] *Accord Ten Mile Indus. Park v. Western Plains Serv. Corp.*, 810 F.2d 1518, 1527 (10th Cir. 1987) ("[J]urisdiction over . . . individual officers and directors must be based on their individual contacts with the forum state."); *Bowers v. Neti Technologies, Inc.*, 690 F. Supp. 349, 358-59 (E.D. Pa. 1988) (due process requires that nonresident officers and directors must be shown to have "sufficient forum-related contracts *independent* from their contacts as corporate officers or directors") (emphasis added).

placed. *Anilas*, for example, involved an officer who had signed a contract in her *individual capacity*, as a co-guarantor, with a corporation based in the forum state. Similarly, *Burger King* established jurisdiction over a defendant who had, *on his own behalf*, negotiated and signed a franchise agreement with a corporation based in the forum state. In the present action, none of the individual defendants did anything in his individual capacity, and none had any direct dealings with Ohioans concerning the Limited Partnership. Indeed, as even Petitioner concedes, the only alleged contact some, but not all, of the individual defendants have to Ohio is that they lent their names to a Prospectus that found its way there and should thus have foreseen "being haled into an Ohio court." (Pet. at p. 50.) "[T]he foreseeability of causing *injury* in another State" is insufficient to permit the exercise of personal jurisdiction over a defendant, however. *Burger King*, 471 U.S. at 474 (emphasis in original). Instead, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Id.* (citation omitted).[23]

As this Court stated in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987):

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum

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[23] Other cases cited by Petitioner are similarly inapposite. For example, *Reliance Electric Co. v. Luecke*, 695 F. Supp. 917 (S.D. Ohio 1988), involved a personal guaranty executed by the defendant, and it was this guaranty which the court characterized as an action within the state. *Wright Int'l Express, Inc. v. Roger Dean Chevrolet, Inc.*, 689 F. Supp. 788 (S.D. Ohio 1988), involved a corporate defendant, not an individual. Moreover, the defendant directly negotiated for plaintiff's business using the wires and mail, and the business of the contract would take place in Ohio. *Id.* at 791. Such factors dramatically distinguish *Wright* from the instant action.

> State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. *But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream an act purposefully directed toward the forum State.*

Id. at 112 (emphasis added). For that reason, this Court in *Asahi* concluded that California did not have personal jurisdiction over a defendant manufacturer whose only contact to the state was an awareness that a component it sold to a Taiwanese manufacturer would be incorporated into a product ultimately sold in California. *Id.* at 112-13. For the same reason, the Ohio courts properly concluded that the necessary minimum contacts were absent here, particularly in light of the fact that Petitioner's real complaint attacks not the distribution of the Prospectus, but the operation of the Limited Partnership in California.

Petitioner's further reliance on Section 22(a) of the 1933 Act (15 U.S.C. § 77v(a))—which simply confers nationwide personal jurisdiction on the *federal* courts—does nothing to alter this conclusion. Section 22(a) does *not* authorize state courts to exercise personal jurisdiction over defendants in suits under the Act. *Negin v. Cico Oil & Gas Co.*, 46 Misc. 2d 367, 368, 259 N.Y.S.2d 434, 436 (Sup. Ct. 1965). Instead, defendants in an action under the 1933 Act are subject to personal jurisdiction in state court *only* if they have sufficient contacts with the forum state. *Id.*[24]

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[24] *See also Milton R. Barrie Co. v. Levine*, 54 A.D.2d 642, 387 N.Y.S.2d 627 (1st Dep't 1976) (applying state long-arm statute to determine if defendant was amenable to personal jurisdiction in 1933 Act case); *Casebolt v. Kanawha & M&R Co.*, 5 Ohio App. 431, 434-35 (Franklin Cty. 1916) (holding that a federal statute

In sum, since the individual defendants had no personal contacts with Ohio regarding the Limited Partnership, the Ohio courts correctly concluded that, as a matter of law, Ohio state courts lacked personal jurisdiction over the individual defendants.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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which, like the 1933 Act, provides that the subject matter "jurisdiction" of the state and federal courts shall be "concurrent," does not "enlarge the jurisdiction, over the person of the defendant, conferred by the state upon the state court").

The cases cited by Petitioner in support of a contrary rule are inapposite. *See, e.g., Abeloff v. Barth*, 119 F.R.D. 315 (D. Mass. 1988) (pertaining to the jurisdiction of a federal court under § 22(a)); *Clement v. Pehar*, 575 F. Supp. 436, 438 (N.D. Ga. 1983) (discussing jurisdiction in federal, not state, courts). The California lower court's *dictum* in *Lakewood Bank & Trust Co. v. Superior Court*, 129 Cal. App. 3d 463, 180 Cal. Rptr. 914, 918 (1st Dist. 1982), is inconsistent with *Casebolt* and the other cases cited above, and should not be followed.